

Remarks

Claim 4 is rejected under 35 USC §112, first paragraph. On page 12 of applicants' Amendment mailed July 15, 2004, in the last sentence of the third paragraph, applicants indicated that then-amended claim 4 was amended so as to be consistent with the amendment to claim 1. This remains accurate. Nevertheless, applicants obviate this §112 rejection by canceling claim 4.

Claims 13 and 30 are rejected under 35 USC §112, second paragraph. Without agreeing with the correctness of this rejection, applicants obviate same by canceling claims 13 and 30.

The office indicates that claims 1-39 are rejected under 35 USC §103 from Kang et al. Applicants respectfully understand that this rejection is made with respect to all of the claims which had been in this application, namely claims 1, 3-20 and 22-39.

Independent claims 1 and 20 are amended to specify that the citrus feed supplement is at a concentration of not more than 1.5 weight percent, based on the total weight of the poultry feed diet composition. In addition, independent claims 1 and 20 are amended to state with more particularity that the citrus byproduct particles which are generated by citrus juice expressing are from citrus peel, pulp, flavedo, albedo and/or rag. This subject matter is from claims 10 and 27 which are currently cancelled.

The Office states that the Kang et al. abstract teaches using 2-4% citrus peel in boiler diets. Applicants respectfully observe that this statement acknowledges that applicants' claimed concentration of not more than 1.5 weight percent is outside the teaching of Kang et al. The Office goes on to acknowledge that the 0% level of the dietary treatments of Kang et al. was the control. The Office concludes that, from these teachings, it would have been obvious to one of ordinary skill in the art to optimize levels to get the best result when trying levels between 0.1 and 5.9 percent. Applicants respectfully observe that this reasoning applies an "obvious to try" standard of patentability. Such a standard is not sanctioned.

As recognized in MPEP §2145, it is improper to apply an "obvious to try" rationale in support of an obviousness rejection. As noted in that section, it is not proper to base an obviousness determination on whether it would have been obvious to:

try each of numerous possible choices until one possibly arrived at a successful result, where the prior art gave either no indication of which parameters were critical or no direction as to which of many possible choices is likely to be successful. (MPEP §2145 citing to *In re O'Farrell*, 853 F.2d 894, 903, 7 USPQ2d 1673, 1681 (Fed. Cir. 1988)).

Here, the references do not teach the importance of not exceeding the 1.5 weight percent level for the citrus byproduct particles in the poultry feed composition. See also, *Pin/Nip, Inc. v. Paltte Chemical Company*, 304 F.3d 1235 (Fed. Cir. 2002) (Federal Circuit affirmed that a patent claim was not invalid as

obvious. If "obvious to try" were a proper rationale, invalidity might have been found.)

The prior art cited against the present application cannot be used to render the present claims obvious by using an "obvious to try" approach.

Applicants have submitted objective evidence showing the importance of not exceeding this 1.5 weight percent level. The objective evidence shows the following. At a level higher than claimed, that is at the level which is immediately outside of the "not exceeding 1.5 weight percent level," namely at 1.6 weight percent, there are undesirable results. This objective evidence must be fully considered by the Office. See MPEP §2141.

Applicants had discussed this objective evidence in the Amendment mailed July 15, 2004. This objective evidence is found in applicants' description as filed. As noted beginning in about the center of page 13 of that Amendment, Example 1 of applicants' description shows that when the same citrus feed supplement (which was shown in applicants' reported data to be very valuable at levels lower than the claimed 1.5 weight percent) was used at a level of 1.6 weight percent, unsatisfactory results were shown. Thus, at the 1.6 weight percent level, there was no effect or a detrimental effect on each of the following: feed conversion at 18 days, adjusted feed conversion at 18 days, feed conversion at 50 days, and mortality. Nothing in Kang et al. suggests that going below the 2-4 percent citrus peel level would be beneficial. Nothing in Kang et al. would have suggested to one of ordinary skill in the

art that a level of 1.6 percent would be unsatisfactory, whereas lower levels would be much more beneficial than feeding at the 1.6 weight percent level.

Reconsideration and withdrawal of the §103 rejection from the Kang et al. reference are therefore respectfully requested, as is the allowance of each of present claims 1, 3, 5-9, 11, 12, 14-20, 22-26, 28, 29 and 31-39.

The Office indicates that claims 20-39 are rejected under 35 USC §102(b) or under 35 USC §103 from the Deyoe et al. article. In the Amendment mailed July 15, 2004, applicants provided information and discussion which, in effect, describe the ambiguity of Deyoe et al. This article does not give information that teaches the "citrus bioflavonoids" tested according to that article are the same as the citrus byproduct particles which are claimed by applicants and which originate from peel, pulp, flavedo, albedo and/or rag from citrus juice expressing, as in independent claims 1 and 20.

Clearly, there is no disclosure, teaching or suggestion that the Deyoe et al. "citrus bioflavonoids" are as specified in dependent claim 11 or claim 28. There is no suggestion of a ground particle size of about 2 mm or less. Irrespective of the novelty and unobviousness of other claims, Applicants respectfully request reconsideration and the allowance of claims 11 and 28.

Apart from this failure to teach "particles", as applicants discussed beginning on page 14 of the Amendment mailed July 15, 2004, the art recognizes bioflavonoids as being other than the

citrus byproduct particles of peel, pulp, flavedo, albedo, rag and combinations thereof, as specified in independent claims 1 and 20. Furthermore, Deyeo et al. do not teach that their citrus bioflavonoids are a combination of byproduct components, each in its native state as present in dried citrus byproduct from juice extraction equipment, as specified in dependent claims 12 and 29. Reconsideration and allowance of these dependent claims are respectfully requested independent of their dependence upon claim 1 or claim 20.

Due to the ambiguity of "citrus bioflavonoids" referred to in Deyeo et al., this reference is not properly construed as teaching that "citrus bioflavonoids" means constituents of the citrus byproduct generated by expressing citrus juice from citrus fruit, namely peel, pulp, flavedo, albedo, rag and combinations. A bioflavonoid is, after all, a chemical compound such as hesperidin. See Deyeo et al., page 1088, left column, second paragraph, lines 4-5. With this understanding, the ambiguous teaching of Deyeo et al. can be understood as teaching at least 12 weight percent of citrus byproduct of the type applicants claim, and not 0.5 percent. See pages 14-16 of applicants' Amendment mailed July 15, 2004.

Putting aside the ambiguity of what Deyeo et al. mean by "citrus bioflavonoids," the Office observes that the Deyeo et al. article does mention that the tests of this article indicated that the Deyeo et al. "citrus bioflavonoids" can be included in the diet without detrimental effects "up to 2.5 percent." However, the objective evidence in applicants' specification which is discussed above indicates that a level of

as low as 1.6 weight percent of applicants' citrus byproduct particles is not satisfactory, thereby showing the inappropriateness of 64% (1.6 divided by 2.5) of the Deyeo et al. "range."

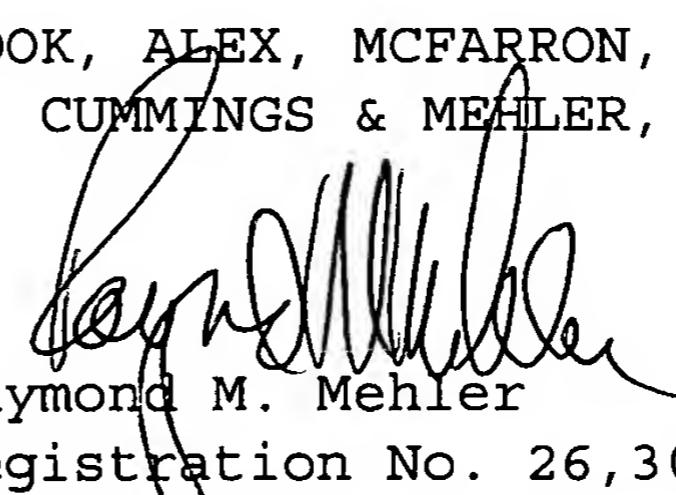
Accordingly, one of ordinary skill in the art would not have been taught by Deyeo et al. the importance of having the levels of citrus byproduct particles be not more than 1.5 weight percent. This is taught by applicants, not by Deyeo et al.

Reconsideration and withdrawal of the §102 and 103 rejections from Deyeo et al. are respectfully requested.

Applicants look forward to an indication that all of the claims remaining in this Application, namely claims 1, 3, 5-9, 11, 12, 14-20, 22-26, 28, 29, and 31-39, are allowed.

Respectfully submitted,

COOK, ALEX, MCFARRON, MANZO,
CUMMINGS & MEHLER, LTD.


Raymond M. Mehler
Registration No. 26,306

RMM/ca
200 West Adams Street
Suite 2850
Chicago, Illinois 60606
(312) 236-8500
Dated: February 28, 2005